Office - Supreme Court, U.S
FILED
DEC 24 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ADJUSTERS REPLACE-A-CAR, INC.,
AND WAKELY & ASSOCIATES, INC.,
Petitioners,

v.

AGENCY RENT-A-CAR, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

TERRY S. BICKERTON*
A. MICHAEL FERRILL
COX & SMITH INCORPORATED
600 National Bank of Commerce Bldg.
San Antonio, Texas 78205
(512) 226-7000

Attorneys for Respondent, Agency Rent-A-Car, Inc.

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203.

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether the decision of the Court of Appeals denied Petitioners due process of law?

II. Whether the Court of Appeals correctly declined to permit Petitioners to adduce evidence on appeal that was not presented to the jury?

III. Whether the Court of Appeals' alternative holding that proof of low barriers to entry precluded a finding of dangerous probability of successful monopolization in this case presents an issue appropriate for certiorari?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 4

I. The Decision of the Court of Appeals Did Not Deny Petitioners Due Process Of Law 5

II. The Court of Appeals Correctly Declined Petitioners' Offer To Adduce Evidence On Appeal Not Presented To The Jury 10

III. The Court of Appeals' Conclusion Regarding the Absence of a Dangerous Probability of Success Does Not Present an Issue Appropriate For Certiorari 11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES	Page
Americana Industries, Inc. v. Wometco de Puerto Rico, Inc., 556 F.2d 625 (1st Cir. 1977)	8
Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933)	9
Bayou Bottling, Inc. v. Dr Pepper Co., 725 F.2d 300 (5th Cir.), *cert. denied*, 105 S. Ct. 123 (1984)	6
Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980)	9
Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) *(en banc)*	7
Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427 (7th Cir. 1980)	7
Colten v. Kentucky, 407 U.S. 104 (1972)	9
Franklin v. First Money, Inc., 427 F. Supp. 66 (E.D. La. 1976), *aff'd*, 599 F.2d 615 (5th Cir. 1979)	8, 9
Hansen v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977)	8
International Air Industries, Inc. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976)	4, 6, 12
Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978)	7

Table of Authorities Continued

CASES	Page
MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983)	7
Malcolm v. Marathon Oil Co., 642 F.2d 845 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981)	5, 6
Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1594 (1984)	12
Northeastern Telephone Co. v. American Telephone and Telegraph Co., 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982)	7
O. Hommel Co. v. Ferro Corp., 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982)	8
Pacific Engineering & Production Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977)	7
Piccirillo v. New York, 400 U.S. 548 (1971)	13
SuperTurf, Inc. v. Monsanto Co., 660 F.2d 1275 (8th Cir. 1981)	8
United States v. American Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984)	9
United States v. Johnston, 268 U.S. 220 (1925)	11
United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897)	9
United States v. United States Gypsum Co., 438 U.S. 422 (1978)	9

Table of Authorities Continued

Page

STATUTES AND RULES

U.S. CONST. amend. V 5, 8, 9

15 U.S.C. § 2 2

Rule 17, Rules of the Supreme Court 4, 5, 15

Rule 28.1, Rules of the Supreme Court 1

TREATISES AND LAW REVIEWS

II P. AREEDA & D. TURNER, ANTITRUST LAW (1978) 9

Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-793

ADJUSTERS REPLACE-A-CAR, INC.,
AND WAKELY & ASSOCIATES, INC.,
Petitioners,

v.

AGENCY RENT-A-CAR, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

Respondent, Agency Rent-A-Car, Inc. ("Agency"),[1] respectfully requests the Court to deny the Petition for a Writ of Certiorari to review the Judgment entered in this case by the United States Court of Appeals for the Fifth Circuit on July 9, 1984.

---

[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, we note that Agency is not a subsidiary of any other entity.

STATEMENT OF THE CASE

This is a civil antitrust suit brought by Adjusters Replace-A-Car, Inc. ("Adjusters") and Wakely & Associates, Inc. ("Wakely"), against Agency, alleging attempted monopolization of the "replacement rental car" market[2] in violation of section 2 of the Sherman Act, 15 U.S.C. § 2.[3] Specifically, Petitioners allege that Agency engaged in predatory pricing in the San Antonio and Austin, Texas markets, and hired an employee of Adjusters' Corpus Christi, Texas outlet.

During the course of pre-trial discovery, Petitioners propounded four requests for admissions, wherein Petitioners requested Agency to admit that, during the times Agency rented automobiles for $7.00 and $8.00 per day, Agency's San Antonio and Austin offices sustained a "net loss from operations." Agency admitted all four propositions. Petitioners eschewed the opportunity to depose Agency's expert witness prior to trial, and likewise declined Agency's pre-trial offer to exchange the exhibits that the parties intended to offer into evidence (Pet. App. at 15a). Instead, as the Court of Appeals noted, Petitioners proceeded to trial solely on the admissions that Agency's San Antonio and Austin offices sustained a

---

[2] As defined by Petitioners, this market includes firms that rent automobiles to replace temporarily a vehicle that is damaged or otherwise inoperable, but does not include major car rental companies, such as Avis and Hertz. Although Agency disputed Petitioners' definition of the market, it was accepted as a matter of law by the District Court.

[3] The procedural history and facts involved herein are set forth in the opinion of the Court of Appeals, appended to the Petition for a Writ of Certiorari ("Petition"). References herein to the Petition appear as (Pet. at _____), and to the opinion of the Court of Appeals as (Pet. App. at _____).

net loss during the relevant time periods.[4] As the Court of Appeals noted, "[t]his was a costly error" (Pet. App. at 13a).

At trial, Agency introduced evidence demonstrating that the prices of which Petitioners complained never dropped below Agency's average variable cost, and that, indeed, Agency's prices were always at least forty percent greater than its average variable cost. Both the District Court and the Court of Appeals concluded that the exhibits upon which the testimony of Agency's expert was based were not inconsistent with Agency's pre-trial admissions, because those admissions—which related only to a "net loss from operations"—pertained to average *total* cost, not average variable cost (Pet. App. at 14a).[5] As the Court of Appeals noted, Petitioners—who had conducted no discovery whatsoever with respect to Agency's costs—"erroneously assumed that Agency's admissions gave them all the ammunition they needed, and were surprised to discover at trial that their big gun was not loaded" (Pet. App. at 15a). The Court of Appeals rejected the suggestion that Petitioners had been "ambushed," noting that prior to trial Agency's

---

[4] Inasmuch as Petitioners do not now complain of the ruling by the Court of Appeals with respect to the Corpus Christi, Texas market, we will not address that determination.

[5] The Court of Appeals also rejected Petitioners' suggestion that the exhibits, which showed that Agency's local revenues were greater in some months than local expenses, were inconsistent with the pre-trial admissions, because the exhibits excluded an allocation for the fixed cost of Agency's national corporate overhead (Pet. App. at 14a).

expert witness and exhibits had been offered to Petitioners, who declined both offers (Pet. App. at 15a).

As noted above, the District Court adopted, over Agency's objection, Petitioners' definition of the relevant product market as a matter of law. The District Court also denied Agency's motion for directed verdict and Agency's request to submit a special interrogatory on Agency's average variable cost, both of which were expressly based on the Fifth Circuit's prior decision in *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

Following the jury's verdict in favor of Petitioners, the District Court granted Agency's motion for judgment notwithstanding the verdict, and denied Agency's conditional motion for new trial, which was based in part on the District Court's denial of Agency's request to submit the issue of the relevant product market to the jury. On July 9, 1984, the Court of Appeals affirmed the Judgment of the District Court on the ground that, absent proof of high barriers to the entry of new firms, Petitioners' failure to adduce any evidence to suggest that Agency's prices ever fell below average variable cost foreclosed a finding of predation (Pet. App. at 17a-18a). The Court of Appeals denied Petitioners' petition for rehearing and suggestion for rehearing *en banc* on August 20, 1984.

REASONS FOR DENYING THE PETITION

Rule 17 of the Rules of the Supreme Court provides that a review on writ of certiorari "will be granted only when there are special and important reasons therefor." Having failed to adduce evidence to support their allega-

tions of predatory pricing, and in an effort to meet the requirements of Rule 17, Petitioners seek to characterize the Court of Appeals' decision as a violation of the right to due process of law under the Fifth Amendment to the Constitution of the United States. As demonstrated below, Petitioners' argument is as untenable as it sounds, because it is premised upon a mischaracterization of the Court of Appeals' decision and contrary to settled precedent.

I. THE DECISION OF THE COURT OF APPEALS DID NOT DENY PETITIONERS DUE PROCESS OF LAW

Although Petitioners' quarrel with the Court of Appeals' decision is, charitably, somewhat opaque, their principal argument appears to be that, at the time this case was tried, the law in the Fifth Circuit regarding predatory pricing was unclear, and that, in affirming the District Court's judgment n.o.v., the Court of Appeals followed legal principles that surprised Petitioners. Expanding on this argument, Petitioners claim that they were deprived of the right to trial by jury on the issue that the Court of Appeals held to be determinative, *i.e.*, whether Agency's prices were above or below average variable cost (Pet. at 6-10). Specifically, Petitioners profess astonishment with the Court of Appeals' determination that "the law in this circuit is that where barriers to entry are not pronounced predatory pricing is not established unless the defendant has set his price below his average variable cost" (Pet. App. at 12a; footnote omitted). Relying upon the Fifth Circuit's prior opinion in *Malcolm v. Marathon Oil Co.*, 642 F.2d 845 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981), wherein the Court ack-

nowledged in dicta[6] the ongoing debate between adherents of the Areeda-Turner average variable cost test for predation,[7] and critics of that view, Petitioners argue that, prior to the Court of Appeals' decision herein, the law in the Fifth Circuit regarding predatory pricing was "unclear."

The principal difficulty with Petitioners' argument is that it is flatly foreclosed by the opinion of the Court of Appeals. As the Fifth Circuit explained, its prior decision almost a decade ago in *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976), embraced the average variable cost test as the law of that Circuit:

> While the *Malcolm* panel noted the ongoing debate between partisans of an economic test for predation—the Areeda-Turner approach—and partisans of an intent test—the Sullivan approach—and disclaimed any view of the merits of these alternative analytical frameworks, this court had already joined the economic camp in *American Excelsior*, and that decision bound the panel deciding *Malcolm* as it binds this panel.

(Pet. App. at 11a) (citations omitted).[8]

---

[6] The question of predatory pricing was not before the Court of Appeals in *Malcolm*, and the Court therein properly declined to offer any opinion on the relative merits of the competing theories. 642 F.2d at 854 n.17.

[7] *See* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV 697 (1975).

[8] The Court of Appeals went on to note that the average variable cost test again was embraced by that Court in *Bayou Bottling, Inc. v. Dr Pepper Co.*, 725 F.2d 300 (5th Cir.), *cert. denied*, 105 S. Ct. 123 (1984) (Pet. App. at 11a-12a).

Simply stated, in light of the Court of Appeals' express recognition that its decision herein not only is in accord with, but indeed was mandated by, prior decisions of that Court, Petitioners' suggestion to the contrary is less than compelling. That Agency asserted the average variable cost test in its motion for summary judgment, motion for directed verdict, proposed jury instructions[9] and motion for judgment notwithstanding the verdict, as well as the overwhelming adoption by other Circuits of the average variable cost test as a *prima facie* test for predation,[10] further refute Petitioners' claim that they were not on notice of that test.

---

[9] Petitioners' suggestion that they were denied the opportunity to have the jury decide the question whether Agency's prices were above or below average variable cost has a somewhat checkered history. Agency—not Petitioners—submitted a requested instruction on average variable cost. Petitioners, on the other hand, ardently insisted before the District Court that the average variable cost test should not be applied. Moreover, in affirming the District Court's judgment n.o.v., the Court of Appeals determined that Petitioners failed to raise a jury issue with respect to whether Agency's prices were above or below average variable cost. *See Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) *(en banc)*. At the risk of belaboring the obvious, an "issue" not raised by the evidence need not be submitted to the finder of fact.

[10] *See MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983); *Northeastern Telephone Co. v. American Telephone and Telegraph Co.*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 432 (7th Cir. 1980); *Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848, 858 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert.*

(Footnote continued on next page)

Finally, it is worth noting that Petitioners have failed to identify any authority to support the notion, lurking behind their contentions, that the Due Process Clause of the Fifth Amendment serves to ensure that litigants are not surprised by judicial decisions. Indeed, any such principle of Constitutional law was unequivocally and properly rejected by Judge Rubin in *Franklin v. First Money, Inc.*, 427 F. Supp. 66 (E.D. La. 1976), *aff'd*, 599 F.2d 615 (5th Cir. 1979):

> The defendant contends the court's decision "startled" it. The decision was, it asserts, so unpredictable that a regulation permitting it to be reached is unconstitutional. But the fact that a decision interpreting a statute or regulation surprises the parties does not make the law unconstitutional. *The due process clause does not protect citizens against judicial decisions that they consider unforeseeable, nor does it assume that litigants will always receive judgments on their lawsuits that they can accept with equanimity.*

427 F. Supp. at 68 (emphasis added). Judge Rubin went on to note:

> A statute so vague as to have no predictable meaning is void for vagueness. But this doctrine does not ordain the unconstitutionality of a statute that two lawyers may read differently, nor does it mean that

---

(Footnote 10 continued)

denied, 434 U.S. 879 (1977); *Hansen v. Shell Oil Co.*, 541 F.2d 1352, 1358 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Americana Industries, Inc. v. Wometco de Puerto Rico, Inc.*, 556 F.2d 625 (1st Cir. 1977); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981).

> persons subject to the law may bank against startling or inconsistent decisions. *The fundamental purpose of the doctrine is to prevent capricious and unforeseeable enforcement of the law, and to require its application in a fair and reasonable manner.*

427 F. Supp. at 69 (emphasis added), *citing Colten v. Kentucky*, 407 U.S. 104, 110 (1972).[11]

Petitioners, of course, do not expressly challenge the constitutionality of the Sherman Act, for that question was resolved over eighty years ago. *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897). Petitioners' attempt to achieve the same result through the pretext of arguing the "unpredictability" of the Court of Appeals' decision is not only counterfactual, but, under the foregoing principles, fails to raise a cognizable claim under the Due Process Clause. Thus, no issue appropriate for certiorari is presented.

---

[11] Recently, the Fifth Circuit reaffirmed the principle that the drafters of the Sherman Act did not purport to obviate the necessity for judicial interpretations thereunder:

> We reject appellees' argument that because the courts previously have not been faced with a factual situation similar to the case at bar, that the conduct cannot violate the antitrust laws. By deliberately choosing not to delineate the myriad activities which would be forbidden by the Act, Congress left to the courts the task of determining whether given conduct constitutes an offense under the Sherman Act.

United States v. American Airlines, Inc., 743 F.2d 1114, 1122 n.14 (5th Cir. 1984), *citing, United States v. United States Gypsum Co.*, 438 U.S. 422, 474 n.14 (1978); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 272 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); II P. AREEDA & D. TURNER, ANTITRUST LAW ¶1310 (1978).

II. THE COURT OF APPEALS CORRECTLY DECLINED PETITIONERS' OFFER TO ADDUCE EVIDENCE ON APPEAL NOT PRESENTED TO THE JURY

Petitioners' alternative argument is that the District Court and the Court of Appeals erred in determining that the record fails to demonstrate that Agency's prices were below average variable cost. As noted above, however, Petitioners proceeded to trial solely on the basis of Agency's admissions that the local Agency offices experienced a "net loss from operations" during the relevant time periods, and, in the Court of Appeals' words, "did not offer any evidence respecting Agency's variable and fixed costs of operation" (Pet. App. at 13a).[12]

In the Fifth Circuit, Petitioners attempted to argue that *had* certain costs been incurred by Agency's local offices, and *had* those costs not been included in the financial statements relied upon by Agency's expert, the

---

[12] The Petition is laced with oblique references to the District Court's supposed refusal to permit Petitioners to attempt to rebut Agency's proof of above-average variable cost pricing, as well as the suggestion that Agency "admitted" that numerous cost items incurred by Agency's local offices were excluded from Agency's exhibits (Pet. at 7-10, 14). Neither proposition is supported by the record. As the Court of Appeals noted, "[t]he underlying documents were in fact made available to plaintiffs" (Pet. App. at 15a), and Agency's witnesses allowed only that *had* certain costs been incurred by the local offices, and *had* those costs not been considered when preparing Agency's exhibits, the conclusions drawn therefrom might have been different. The Court of Appeals correctly concluded that such unsupported assumptions could not substitute for positive evidence (Pet. App. at 17a).

local offices might have experienced losses during certain months. As the Court of Appeals noted:

> Such evidence, however, had to be set before the jury, and the record shows that plaintiffs failed to carry their burden even of proving a prima facie case of below-cost pricing. Although plaintiffs challenged many of the assumptions shaping the opinion of Agency's expert, the record is devoid of any positive evidence that Agency's average variable cost ever exceeded its prices.

(Pet. App. at 17a). The foregoing principles fully apply to Petitioners' attempt to induce this Court to perform the fact-finding function that the Court of Appeals properly declined.[13] As Mr. Justice Holmes stressed in *United States v. Johnston*, 268 U.S. 220, 227 (1925), "[w]e do not grant a certiorari to review evidence and discuss specific facts." Because Petitioners' request is properly so characterized, the Petition should be denied.

III. THE COURT OF APPEALS' CONCLUSION REGARDING THE ABSENCE OF A DANGEROUS PROBABILITY OF SUCCESS DOES NOT PRESENT AN ISSUE APPROPRIATE FOR CERTIORARI

As noted above, in affirming the Judgment of the District Court, the Court of Appeals held that, absent proof of high barriers to the entry of new firms, Petitioners' failure to present any evidence to the jury to suggest that Agency's prices ever fell below average variable cost precluded a finding of predatory pricing. In

---

[13] The "evidence," assumptions and conclusions set forth in the Petition (Pet. at 12-13) are substantially the same as those proffered by Petitioners for the first time to the Court of Appeals.

addition, the Court of Appeals noted that the absence of high entry barriers "dooms not only plaintiffs' claim of predatory pricing, but also another necessary element of their case—the dangerous probability of success" (Pet. App. at 19a-20a). As the Court of Appeals explained, "[i]f the market structure will not allow a dominant firm to set its price above the competitive level, the strictures of the antitrust laws are not activated" (Pet. App. at 20a).

Again, Petitioners appear to avoid a direct challenge to the merits of the Court of Appeals' reasoning, choosing instead to argue that the Court's determination concerning the significance of entry barriers conflicts with that Court's prior decision in *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F. 2d 980 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1594 (1984). This contention likewise misses the mark. Simply stated, nothing in *Multiflex* suggests—much less ensconces in *stare decisis*—a determination by the Fifth Circuit that the absence of entry barriers is irrelevant to attempted monopolization analysis. Rather, the Court in *Multiflex* simply reaffirmed the well-settled principle that the attempt offense under section 2 does not always require proof of actual injury to competition, but requires only that the conduct complained of present a dangerous probability of successful monopolization. 709 F.2d at 990-92. This, of course, is fully consistent with the determination below that conduct cannot present a dangerous probability of monopolization if, all things being equal, entry barriers are so low that supracompetitive prices would attract new entrants, thus driving the market price back to competitive levels (Pet. App. at 17a-18a). This precept likewise is fully in accord with *Excelsior*. *See* 517 F.2d at 724.

In any event, Petitioners' characterization of the deci-

sions below, even if accepted *arguendo*, leads nowhere. As noted above, Petitioners do not attempt to demonstrate that the Court of Appeals' determination concerning the significance of entry barriers was erroneous, but argue only that the Fifth Circuit's decision supposedly was contrary to a prior decision of *that* Court—arguably a matter for *en banc* rehearing before the Court of Appeals,[14] but hardly a matter appropriate for review on certiorari. More important, the Court of Appeals' discussion concerning entry barriers was at best an *alternative* holding to that Court's primary determination that Petitioners failed to raise an issue of predatory pricing. Accordingly, absent a determination that a *prima facie* case of predatory pricing in fact was adduced by Petitioners, the Court of Appeals' determination concerning the significance of low barriers to entry in the context of the "dangerous probability of success" element, does not present an issue appropriate for certiorari. *See Piccirillo v. New York*, 400 U.S. 548 (1971) (certiorari not appropriate when decision below rests on adequate alternative ground).

---

[14] As noted above, the suggestion for rehearing *en banc* was denied by the Court of Appeals.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

TERRY S. BICKERTON*
A. MICHAEL FERRILL
COX & SMITH INCORPORATED
600 National Bank of Commerce Bldg.
San Antonio, Texas 78205
(512) 226-7000

Attorneys for Respondent,
Agency Rent-A-Car, Inc.

* *Counsel of Record*

December 24, 1984.